No. 17-532

In the Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition for Writ of Certiorari to the District Court of Wyoming, Sheridan County

SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
SUPPLEMENTAL BRIEF FOR PETITIONER 1
CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Bobby v. Bies,
556 U.S. 825 (2009) 3

Crow Tribe v. Repsis,
73 F.3d 982 (10th Cir. 1995) 3

Hagen v. Utah,
510 U.S. 399 (1994) 3

Minnesota v. Mille Lacs Band of Chippewa Indians,
526 U.S. 172 (1999) 3

Morton v. Mancari,
417 U.S. 535 (1974) 1

State v. Buchanan,
978 P.2d 1070 (Wash. 1999) 4

Ward v. Race Horse,
163 U.S. 504 (1896) 4

SUPPLEMENTAL BRIEF FOR PETITIONER

The United States correctly observes that the decision below is incorrect, that the question presented has generated conflicts in the lower courts, and that this case is a suitable vehicle for resolving the question presented. Particularly in light of the federal government's "special relationship" with Indian tribes, *Morton v. Mancari*, 417 U.S. 535, 552 (1974), this Court should heed the government's well-informed, unambiguous view that the petition should be granted.

The state proffers three arguments in a last-ditch effort to avoid review. None should give this Court any pause.

First, repeating an assertion from its brief in opposition, *see* Opp.11, 18, 22, 24-25, the state contends that certiorari is unwarranted because, even if the Crow Tribe possesses hunting rights under the 1868 Treaty, Wyoming's hunting regulations as applied to the Tribe are justified by "conservation necessity." *See* Supp.Br.2-6. The state argues that this case is a poor vehicle to address the question presented because the trial court ruled against Petitioner on that "independent, alternative ground" for sustaining his conviction. *Id.*

As Petitioner and the United States have explained, this argument plainly lacks merit. *See* Reply.12 n.5; US.Br.21. Petitioner appealed the trial court's misguided "conservation necessity" ruling to the district court. That court did not reach the issue, however, because it held that the Tribe categorically has *no* treaty hunting rights. Indeed, the court specifically stated that it was "unnecessary to address

the conservation necessity issue" because "the treaty rights do not exist." Pet.App.14 n.3. As the United States notes, should this Court grant review and hold that the Tribe's hunting rights have not been categorically abrogated, the district court can, on remand, address whether the state can meet the "demanding 'conservation necessity' standard." US.Br.21.[1]

For the first time before this Court (or any court), the state makes the entirely new argument that Petitioner "has abandoned his appeal" of the trial court's conservation-necessity ruling. Supp.Br.4. This assertion is mystifying, and wrong. The state *concedes* that Petitioner appealed that ruling to the district court. *Id.* And while Petitioner did not subsequently raise the issue on discretionary review before the Wyoming Supreme Court or this Court, that is quite obviously because the district court *declined to address it*, ruling instead that Wyoming's admission to the Union and the creation of the Bighorn National Forest categorically abrogated the Tribe's hunting rights. Petitioner presented *those* "purely legal" issues both to the Wyoming Supreme Court and to this Court, US.Br.21, and there is no obstacle to reviewing them. As noted, should this Court grant review and reverse, Petitioner's preserved challenged to the trial court's flawed conservation-necessity ruling will be squarely teed up before the district court.

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[1] The state deems "profoundly misleading" the government's observation that the Wyoming District Court "'did not address'" the conservation-necessity issue. Supp.Br.2. That assertion is profoundly puzzling given that the district court *expressly stated* that it was "unnecessary to address" the issue. Pet.App.14 n.3.

Second, the state claims that review would "disturb expectations of finality" because a decision by this Court in Petitioner's favor would abrogate *Crow Tribe v. Repsis*, 73 F.3d 982 (10th Cir. 1995). Supp.Br.6-11. But this Court's decisions frequently abrogate even long-established lower-court precedent. Indeed, in the very case on which the state relies, *Hagen v. Utah*, 510 U.S. 399 (1994), this Court abrogated an *en banc* Tenth Circuit decision addressing reservation boundaries. *Id.* at 408-09, 421-22. The state claims that *Hagen* "undermined finality in Utah for decades," Supp.Br.11, but that assertion is unsupported, inconsistent with the finality that this Court's decisions bring to a dispute, and implausible given that *Hagen* resolved a "direct conflict" between two lower courts, 510 U.S. at 409.

Relatedly, the state once again invokes collateral-estoppel principles, claiming that Petitioner and the United States seek to "reopen" the judgment in *Repsis*. Supp.Br.7, 11. But a decision by this Court that abrogates a lower-court decision does not "reopen" the judgment in that case. And as Petitioner and the United States have thoroughly explained, collateral estoppel "pose[s] no barrier to this Court's review," particularly in light of the "'change in the applicable context'" worked by *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). US.Br.19 (quoting *Bobby v. Bies*, 556 U.S. 825, 834 (2009)); *see id.* at 18-21; Pet.30-33; Reply.8-11.

The state takes issue with the United States' position that this case presents "'purely legal'" issues. Supp.Br.10. But the district court *itself* acknowledged that the issues are "questions of law," and it reviewed

them *de novo*. Pet.App.9. The state suggests that "further development of the record" is necessary, but the only examples it musters are facts that it concedes are "not in dispute," like whether Wyoming has achieved statehood. Supp.Br.10. As the United States correctly notes, while an evidentiary hearing "on other issues" might be appropriate if this Court reverses and remands, "no further development of the record is necessary" for this Court to review "the legal issues presented" in the petition. US.Br.22.

Third, in what is more of a merits argument than a basis for denying review, the state disputes the United States' view that *Mille Lacs* repudiated the reasoning of *Ward v. Race Horse*, 163 U.S. 504 (1896). Supp.Br.12-13. The state claims that *Mille Lacs* did not "overrule *Race Horse*." *Id.* But lower courts disagree, *see, e.g.*, *State v. Buchanan*, 978 P.2d 1070, 1083 (Wash. 1999) (holding that this Court "overruled *Race Horse* in ... *Mille Lacs*"), and in all events, the United States recommends certiorari in part "to resolve disagreement" over "the continuing effect and scope of *Race Horse*," US.Br.15. The state has never refuted that lower-court conflict or any of the other lower-court conflicts this case implicates. *See* Pet.24-27; Reply.5-7. And as the United States attests, *see* US.Br.15-18, the divide among the lower courts only confirms the need for review of this "important" case, *id.* at 8.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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